YAM TUNKU DATO' SERI NADZARUDDIN IBNI TUANKU JA'AFAR

v.

DATUK BANDAR KUALA LUMPUR & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
RAMLY ALI J
[NO: R1-25-108-2001]
25 SEPTEMBER 2002

ADMINISTRATIVE LAW: *Remedies - Certiorari, leave to apply for - To quash respondent's decision allowing planning permission for high-rise buildings on land adjacent to applicant's land - Whether applicant had locus standi - Whether application frivolous or vexatious - Whether respondent gave adequate reasons for decision made - Whether increase in density of population taken into consideration - Whether applicant had a legitimate expectation that respondent would not renege previous policy of approving only low-rise buildings - Whether also doctrine of proportionality to be considered*

CIVIL PROCEDURE: *Stay of proceedings - Stay of development plans on land pending substantive motion for certiorari - Whether stay order permissible under O. 53 r. 3(5) Rules of High Court 1980 - Whether phrase "stay of proceedings" confined to proceedings in court only - Whether substantive motion for certiorari would be rendered nugatory if stay not granted*

The applicant sought for leave for an order of *certiorari* to quash the decision of the first respondent who approved the second respondent's plans to develop the land ('the land') adjacent to the applicant's land. The application was made pursuant to O. 53 r. 3 of the Rules of the High Court 1980 ('RHC'). The applicant also prayed for a stay order in the event the application for leave was granted by the court.

The issues were: (1) whether the applicant had the *locus standi* to make the application; (2) whether the application was frivolous or vexatious; (3) Whether the first respondent gave adequate reasons for the decision made; (4) Whether the grounds for leave were serious; (5) Whether the increase in the density of the population within the locality was taken into consideration; (6) Whether the applicant had a legitimate expectation that the first respondent would not renege his previous policy of only approving low-rise buildings; and (7) whether doctrine of proportionality should also be considered.

Held:

[1] The applicant would be adversely affected by the decision of the first respondent to develop the land adjacent to his land. The notice issued by the first respondent to the applicant requesting his views on the development was sufficient to show that the applicant had the necessary *locus standi*. This was further strengthened by O. 53 r. 2(4) RHC. (pp 216 f-i & 217 a-b)

[2] The grounds relied upon by the applicant showed that the application was not *prima facie* frivolous or vexatious. There were ample substance in the grounds to consider the allegations made by the applicant and which could only be properly heard and determined on the substantive application for an order of *certiorari* after leave had been granted. (p 220 b)

[3] The first respondent failed to give adequate reasons for his decision to approve the development of the land. The only reason given for the approval was that the units had been reduced from 181 to 107 units with the density of 285 persons per acre. The requirement to give reason is found in s. 22(5) of the Federal Territory (Planning) Act 1982 ('FTPA'). The importance of giving reasoned decision was also recently endorsed by the Federal Court in *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan*. Without adequate reasons given, the applicant had no way of knowing whether all his objections had been taken into consideration. (pp 220 c-h & 221 a)

[4] The grounds of the application were serious and if unrebutted would result in the grant for an order of *certiorari*. Therefore, leave should be granted. (p 221 c)

[5] Based on authorities, the density of the population in the locality of the land to be developed is a material consideration in an application for planning permission as provided under s. 22(4)(b) FTPA. In the present case, the increase of density from 30 persons per acre to 285 persons per acre was unreasonable. The first respondent should give evidence in the hearing of the substantial application for *certiorari* the reasons for his decision. The 10 times increase in the density of the population could be an infringement of the doctrine of proportionality. The authorities showed that this doctrine might be applicable herein. This doctrine could only be heard, considered and determined during full hearing of the substantive application for *certiorari*. (pp 221 d-h & 222 a-h)

[6] There are two forms of legitimate expectation, namely, procedural legitimate expectation and substantive legitimate expectation. In procedural legitimate expectation, the applicant had a legitimate expectation of a right to be heard before a decision was made. In substantive legitimate expectation the applicant had a legitimate expectation that the first respondent when making his decision would not renege on his previous assurance or reverse his previous policy of only approving low-rise buildings. Such issues and novel points of law need to be considered and determined at the hearing of the substantial motion for *certiorari*. (p 223 a-e)

[7] The stay order prayed for by the applicant was permissible under O. 53 r. 3(5) RHC. The phrase "stay of proceedings" is not confined to proceedings in court only. Many applications for judicial review are for orders of *certiorari* to quash decisions of decision-making bodies other than courts including government ministers, local authorities and other bodies whose decisions are susceptible to judicial review. Therefore, the phrase "stay of proceedings" in relation to such bodies must mean "a stay of the process by which the decision challenged has been reached, including the decision itself". (p 223 g-h)

[7a] In the present application, if stay was not granted the second respondent could proceed to develop the land as approved by the first respondent. That would mean that the applicant's substantive motion for *certiorari* would be rendered nugatory in the event he succeeded in his application. (p 224 a-c)

[Application granted.]

Case(s) referred to:

Association of Bank Officers, Peninsular Malaysia v. Malayan Commercial Banks Association [1990] 2 CLJ 734; [1990] 1 CLJ (Rep) 33 ***(refd)***

Datin Azizah Abdul Ghani v. Dewan Bandaraya Kuala Lumpur And Another Appeal [1992] 4 CLJ 2071; [1992] 1 CLJ (Rep) 58 ***(refd)***

Datuk Bandar Kuala Lumpur v. Zain Azahari Zainal Abidin [1997] 2 CLJ 248 ***(refd)***

Ex parte Baker [1995] 1 All ER 73 ***(refd)***

Ex parte Hamble [1995] 2 All ER 714 ***(refd)***

George John v. Goh Eng Wah Bros. Filem Sdn Bhd & Ors [1988] 1 MLJ 319 ***(refd)***

Inland Revenue Commissioners v. National Federation of Self-Employed and Small Business Ltd [1982] AC 617 ***(refd)***

Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan [1999] 3 CLJ 65 ***(refd)***

Mohamed Nordin Johan v. Attorney General Malaysia [1983] 1 CLJ 130; [1983] CLJ (Rep) 271 ***(refd)***

Niarchos (London) Lte v. Secretary of State for the Environment [1997] 35 P & CR 259 ***(refd)***
R v. Secretary of State for Education and Science, ex p Avon County Council [1991] 1 All ER 282 ***(refd)***
Yian Sdn Bhd v. Datuk Bandar Kuala Lumpur [1999] 3 MLJ 605 ***(refd)***

Legislation referred to:
Federal Territory (Planning) Act 1982, s. 22(4)(b), (5)
Planning (Development) Rules 1970, rr. 5(3)(a), (5), 6
Rules of the High Court 1980, O. 53 rr. 2(4), 3(a), (2), (3), (5)

For the applicant - Jack Yow (G Rajasingam); M/s Shearn Delamore

Reported by Usha Thiagarajah

JUDGMENT

Ramly Ali J:
This is an application by the applicant, made *ex parte*, for leave to apply for an order of *certiorari* to quash the decision of the 1st respondent dated 11 September 2001 in which the 1st respondent had approved the development to the land adjacent to the applicant's land by the 2nd respondent, which involved the building of 2 blocks of 20 storey apartments with 107 units with the density of 285 persons per acre.

The application (encl. 1) was made pursuant to O. 53 r. 3 of the Rules of the High Court 1980 (RHC 1980), which provides:

> (1) No application under this Order shall be made unless leave therefor has been granted in accordance with this rule.
>
> (2) An application for leave must be made *ex parte* to a Judge in Chambers and must be supported by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and by affidavits verifying the facts relied on.

The application for leave together with the statement pursuant to O. 53 r. 3(a) and the applicant's affidavit verifying the statement were filed on 25 October 2001. All the papers were served on the AG's chambers on 18 January 2002. On 2 July 2002, the applicant obtained an order for amendment of the statement made by the previous judge (Dato' Abdul Aziz bin Mohamed). The amended statement was filed on 9 July 2002. The affidavit verifying the amended statement was affirmed on 19 August 2002 and filed on 20 August 2002. All these papers were also served on the AG's chambers on 21 August 2002. The applicant has complied with O. 53 r. 3(3) of RHC 1980 which provides:

(3) The applicant must give notice of the application for leave not later than three days before the hearing date to the Attorney General's Chambers and must at the same time lodge in those Chambers copies of the statement and affidavits.

On the hearing date of the application (25.9.2002) there was no representative from the Attorney General's Chambers.

Brief Facts

The facts of this case are set out in detail in the amended statement filed pursuant to O. 53 r. 3(2) RHC 1980. Briefly the facts are as follows:

The land adjacent to the applicant's land was to be developed by the 2nd respondent. The 2nd respondent applied to the 1st respondent (Datuk Bandar Kuala Lumpur) for planning permission. The original plan was to develop 2 blocks of 20 storey apartments (181 units) with gymnasium at roof level and 3 levels of car park. Residential density will be increased from 30 persons to 408 persons per acre, on the said land. Notice was given on 26 August 2000 by the 1st respondent in the New Straits Times and Utusan Malaysia and also by way of a letter dated 22 August 2000 to the applicant regarding the proposed development. The applicant raised various objections in a letter dated 8 September 2000 and also during a meeting convened by the Pengarah Jabatan Perancang dan Kawalan Bangunan of the 1st respondent on 8 November 2000. The 1st respondent issued a notice dated 11 September 2001 which was received by the applicant on 27 September 2001 where by the 1st respondent informed the applicant that the 1st respondent is approving the development and granting the planning permission but reducing the number of units from 181 to 107 with the density of 285 persons per acre.

The applicant is now seeking leave to apply for *inter alia*, an order of *certiorari* to quash the decision of the 1st respondent dated 11 September 2001.

In seeking leave, the applicant raised the following grounds, namely:

i) that the applicant has *locus standi* is respect of the application;

ii) that the application is not *prima facie* frivolous or vexatious;

iii) that the 1st respondent has failed to give any or adequate reason for the said decision;

iv) that the grounds for the application are serious and if unrebutted would result in the applicant succeeding in his application by the notice of motion for *certiorari*;

v) that there will be an increase in population density ratio in the area;

vi) that the decision amounts to a breach of his legitimate expectation ie, a reversal of policy by the 1st respondent of only approving low-rise development with building below 5 storey high in the area;

vii) that the 1st respondent has acted against/contrary to the principle of proportionality.

The Test For Leave Application

The law on the exercise of discretion in granting leave is trite. The test was laid down by the Federal Court in *Association of Bank Officers, Peninsular Malaysia v. Malayan Commercial Banks Association* [1990] 2 CLJ 734; [1990] 1 CLJ (Rep) 33, where it was held that:

> The guiding principles ought to be that the Applicants must show *prima facie* that the application is not frivolous or vexatious and that there is some substance in the ground supporting the application. On the evidence in this case the Appellants had *prima facie* an arguable case for the grant of the relief sought.

It has also been held in that case that the court, in dealing with an application for leave to apply for an order of *certiorari*, shall not go further than the leave stage and not to embark on substantial issues on merit. The Federal Court had also stressed, in that case, that the application for leave is not frivolous or vexatious when "there are grounds to consider the allegations made by the applicant and which could only be properly heard and determined on the substantive application for an order of *certiorari* after leave has been granted."

The same principle was also applied by the Federal Court in *Mohamed Nordin bin Johan v. Attorney General Malaysia* [1983] 1 CLJ 130; [1983] CLJ (Rep) 271, where Raja Azlan Shah (Ag. LP) has said:

> the Appellant should be granted leave to apply for an order of *certiorari* as the point taken was not frivolous to merit refusal of leave *in limine* and justified argument on a substantive motion for *certiorari*. When the Federal Court grants leave, it has jurisdiction to hear the substantive motion.

At this stage of the proceedings the court need not go into the matter in great depth. The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage. If on a guide perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief. The discretion that the court is exercising at this stage is not the same as that which it is called upon to

exercise when all the evidence is in and the matter has been fully argued at the hearing of the substantive application. (see: *Inland Revenue Commissioners v. National Federation of Self-Employed and Small Business Ltd.* [1982] AC 617).

In considering all the above principles to the facts of the present case, the court is in full agreement with Lim Beng Choon J in *George John v. Goh Eng Wah Bros. Filem Sdn Bhd & 2 Ors* [1988] 1 MLJ 319, when he said:

> On principle and authority, the court is of the view that at this stage of the proceeding the court is required only to inquire whether the matter to be decided by the court is not in fact frivolous and vexatious in the sense that it is a trivial complaint of an administrative error by a busybody with a misguided sentiment and misconception of the law. Another requirement at this stage of the proceeding which a court has to consider is that the applicant must produce sufficient evidence to sustain a *prima facie* case that a public officer or authority that made the decision had acted unlawfully or that he or it had, in its exercise of the administrative discretion, acted *ultra vires* the power given to him or it under the relevant statute. If the court is satisfied that the applicant has complied with these two requirements, leave would usually be granted irrespective of whether the applicant has suffered no greater injury than thousands of the King's subjects.

The following issues or grounds were raised by the applicant to support his application ie, that the application is not frivolous and vexatious; and that there is some substance or sufficient evidence to sustain a *prima facie* case.

On the issue of '*locus standi*', the court is satisfied that the applicant is not a mere 'busybody', as he will be adversely affected by the decision of the 1st respondent to develop the land adjacent to his land as approved. The notice dated 22 August 2000 issued by the 1st respondent to the applicant requesting for his views on the development is sufficient evidence to show that the applicant has *locus standi* in respect of the application. The said notice was issued under r. 5(3)(a) of the Planning (Development) Rules 1970, which gives registered owners of lands adjoining the land to which the application relates the right to make objection. The applicant, having received the said notice, raised various objections in a letter dated 8 September 2000 to the 1st respondent. This was done in line with r. 5(5) of the said Rules which gives the applicant four weeks to submit his objection in writing to the 1st respondent. Again, in this respect, the court is in full agreement with Lim Beng Choon J in *George John*'s case when he said:

> In order to have the *locus standi* to invoke the jurisdiction of judicial review, the applicant should claim, if not a legal or equitable right, at least a sufficient interest in respect of the matter to be litigated. The extent of sufficient interest depends on diverse variable factors such as the content and intent of the statute

of which contravention is alleged, the nature of the breaches of statutory power, the specific circumstances of the case, the nature and extent of the applicant's interest or grievance and the nature and extent of the prejudice or injury suffered by him.

This is further strengthened by O. 53 r. 2(4) RHC 1980 which provides:

(4) Any person who is adversely affected by the decision of any public authority shall be entitled to make the application.

Based on the above consideration the court has no hesitation to hold that the applicant in the present case has *locus standi* to make the present application.

In order to determine whether or not the application is *prima facie* frivolous or vexatious, it is necessary to list out the details of the grounds relied on by the applicant (as contained in his affidavit in support). The applicant contends that the 1st respondent when considering and approving the application of the 2nd respondent:

(a) has acted without any or sufficient or reasonable grounds and/or by taking irrelevant considerations into account and/or failing to take relevant considerations into account and/or has reached his decision in a manner that is irrational and/or has acted unreasonably or perversely and/or acted in breach of the legitimate expectation of the applicant and/or acted contrary to the principle of proportionality and/or breach of natural justice or principle of procedural fairness, including:

Particulars

(i) failed to take into account and or give adequate weight to the fact that the Bukit Damansara is a low density residential area which is situated within a low density zoning thus rendering the proposed development manifestly unsuitable for a low density residential area.

(ii) failed to take into account and or give adequate weight to the fact that the Comprehensive Development Plan No. 1040 and No. 1041 put the density at 30 persons.

(iii) failed to take into account and or give adequate weight to the fact that the present development would raise the density from 30 persons per acre to 285 persons per acre.

(iv) failed to take into account and or give adequate weight to the fact that the existing width of the roads, the drainage system, the water supply and the electricity supply are all insufficient to support the proposed development;

(v) failed to make or provide sufficient plans and arrangements for widening the roads, upgrading the drainage system, water supply and electrical supply before approving the planning permission;

(vi) failed to take into account that the set-back of the existing building is too close to the edge of the road notwithstanding the present road reserve and in view of this, that it would be impossible to widen the existing roads;

(vii) failed to take into account that the proposed development is contrary to the other types of development which have been approved in the Bukit Damansara area namely, low rise developments, such as the Prima Damansara, Belair Apartments and the Desa Damansara;

(viii) failed to take into account that the emergence of the development by the second respondent in the Bukit Damansara area would cause, and aggravate further existing traffic, noise and environmental pollution problems;

(ix) failed to commission independent consultants to assess the impact of the proposed development on the existing drainage system, water supply, electric supply, traffic, noise and environmental degradation;

(x) failed to take into account or gave very little weight to the fact that the Bukit Damansara area will not be able to support a high density development, such as the proposed development, as the public utilities that are presently available to the area such as water supply, electricity, drainage, telephone and sewage etc are manifestly inadequate;

(xi) failed to undertake a comprehensive traffic study for the whole of the Bukit Damansara area especially, prior to approving the second respondent's planning permission, as the traffic on the roads in the Damansara area has increased considerably in recent times;

(xii) failed to take into account that with the proposed development, traffic situation in the Damansara area would invariably become chaotic and congested particularly with the recent road building and the Sprint Highway that is taking place;

(xiii) failed to consider that with the massive development of this nature, which is likely to take a number of years to complete, and with the use of foreign labour, there is likely be an increase in crime in that area and that security of the applicant would invariably be put in jeopardy by this development;

(xiv) failed to take into account that the office of the first respondent had previously assured that the approval of new projects above five storey had been frozen, amongst others, in the Damansara area due to the lack of infrastructure to support such developments in those areas;

(xv) failed to give effect to the legitimate expectation of the applicant that the 1st respondent will not renege on its policy of only approving low-rise developments and/or developments with buildings below five storey high in the Bukit Damansara area;

(xvi) failed to give adequate or sufficient reason to justify the approval of the 2nd respondent's application in the 1st respondent's notice dated 11 September 2001;

(xvii) failed to allow the applicant an opportunity to be heard in opposition to the modified development plan which has reduced the units from 181 to 107 with the density of 285 persons per acre;

(xviii) The increase in the density from 30 persons per acre to 285 persons per acre is disproportionately burdensome on the applicant. Consequently the 1st respondent has gone beyond what was necessary to achieve the aim of proper planning under s. 22 of the Federal Territory (Planning) Act 1982 and the Comprehensive Development Plan of Kuala Lumpur;

(xix) failed to take into account the likely threat to the physical safety of the residents of Jalan Batai, including that of the applicant, as the proposed development is situated above the applicant's parcel of land.

(b) has misconstrued the scope and effect of his statutory discretion under the whole of the Federal Territory (Planning) Act 1982 from the decision making process in respect of the decision of the first respondent dated 11 September 2001 (in particular s. 22 thereof) as well as rr. 5 and 6 of the Planning Development Rules 1970 and/or failed to take into account the Comprehensive Development Plans;

(c) has unlawfully and without authority approved the second respondent's application for planning permission without taking into account any and each of the matters raised by the applicant in its grounds of objection dated 8 September 2000 or alternatively by assigning little or no weight to those matters;

(d) has failed or neglected or omitted to take into account that the infrastructure facilities of Bukit Damansara were designed and installed for a lower population density and for small scale, low rise development;

(e) has acted in excess of or without jurisdiction or misapplied his statutory discretion under s. 22 of the Federal Territory (Planning) Act 1982 and/or the Planning (Development) Rules of 1970.

Having gone through the list of grounds relied upon by the applicant, the court is fully satisfied that the present application is not *prima facie* frivolous or vexatious. There are ample substance in the grounds supporting the application. There are grounds to consider the allegations made by the applicant and which could only be properly heard and determined on the substantive application for an order of *certiorari* after leave has been granted.

The applicant also contended that the 1st respondent has failed to give any or adequate reason for his decision to approve the development. The only reason (if we may call it a reason) given for the approval was that the units have been reduced from 181 to 107 units with a density of 285 persons per acre.

The requirement to give reason can be found in s. 22(5) of the Federal Territory (Planning) Act 1982 (the FTPA 1982), which provides:

> (5) Upon the receipt of an application for planning permission the Commissioner shall within such time as may be prescribed either grant or refuse the application and when the application is granted subject to condition or refused, the Commissioner shall give his reasons in writing for his decision.

In *Datuk Bandar Kuala Lumpur v. Zain Azhari bin Zainal Abidin* [1997] 2 CLJ 248, the Court of Appeal, in dealing with s. 22 of the FTPA 1982 Act, has said:

> It also recognises the importance of a reasoned decision by requiring the appellant, in sub-s. (5), to state his reasons when refusing an application for planning permission or when granting conditional approval.

The importance of giving reasoned decision was also recently endorsed by the Federal Court in *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 CLJ 65 (*MPPP* case), where Edgar Joseph Jr. FCJ, held:

> We endorse the principles enunciated by the Privy Council in *Dr. Stefan* and say that in the exceptional circumstances of this case and having regard to the trend towards increased openness in matters of Government and administration as a matter of fairness, reasons should have been given by the Council as to why it was imposing the disputed condition and thus resiling from the original approval of planning permission which was free from any pricing condition.

In the present case, the court agrees with the applicant that the so-called reason given by the 1st respondent in approving the planning permission is highly insufficient and may amount to "no reason at all". Without giving adequate reasons, the applicant has no way of knowing whether all his objections have been taken into consideration.

The grounds in support of the present application are also similar to the grounds cited in *Yian Sdn Bhd v. Datuk Bandar Kuala Lumpur* [1999] 3 MLJ 605. Leave was granted in that case and the learned judge was of the view that the grounds were "serious" and "if unrebutted it would result in the applicant succeeding in its application by the notice of motion for *certiorari*."

In the present application, after going through all the grounds cited by the applicant, this court is also of the view that those grounds are really serious and if unrebutted, would result in the application for an order of *certiorari* being granted, and therefore, leave should be granted.

Issue on increased in population density as raised by the applicant, also deserve consideration in the present application. Examples of other cases where leave was granted in respect of challenge to planning permission that had increased the density of population ratio of the area are as follows: *Datuk Bandar Kuala Lumpur v. Zain Azhari bin Zainal Abidin (supra)*; and *Datin Azizah bte Abdul Ghani v. Dewan Bandaraya Kuala Lumpur and Another Appeal* [1992] 4 CLJ 2071; [1992] 1 CLJ (Rep) 58. In the present application the development will result in an increase of population density from 30 persons per acre to 285 persons per acre. In *Datin Azizah bte Abdul Ghani* the Supreme Court had issued *certiorari* to quash the development on the ground that the development would increase population density from 10 persons to 44 persons an acre. In *Zain Azahari bin Zainal Abidin*, the Court of Appeal had confirmed the decision earlier made by the High Court granting *certiorari* to the applicant on grounds, *inter alia* that the proposed development involved an increase in the population density ratio of the locality from 11 persons per acre to 56 persons per acre.

Based on those authorities, it seems clear that the issue relating to population density in the locality of the land to be developed, is a material consideration to be considered by the Datuk Bandar (the 1st respondent) in dealing with an application for planning permission, as provided under s. 22(4)(b) of the FTPA 1982, which provides that "the Commissioner shall as far as practicable have regard to – (b) any other material consideration."

In the present application, *prima facie*, the increase of density from 30 persons per acre to 285 persons per acre is unreasonable. The 1st respondent should give evidence *via* affidavit (in the hearing of the substantial application for *certiorari*) to explain the reasons for his decision. The 10 times increase of density of population in the area in question if not rebutted would obviously be burdensome on the applicant and can be an infringement of the doctrine of proportionality, which has been accepted in Malaysia *via MPPP* case *(supra)*. In that case (*MPPP* case), the Federal Court has said:

> It was no less an authority then Lord Diplock in the celebrated case of *Council of Civil Service Union & Ors v. Minister of the Civil Services* [1985] AC 374, who, in classifying three grounds for judicial review, alluded to a possible fourth ground of 'proportionality'. Proportionality, of course, embodies a basic principle of fairness and we can see this principle at work in a number of English cases to which we shall presently refer, and we might as well interpolate, to add that the doctrine was referred to as a ground for judicial review by Edger Joseph Jr. FCJ in *R. Rama Chandran v. The Industrial Court of Malaysia* [1997] 1 CLJ 147.

The case of *Niarchos (London) Lte. v. Secretary of State for the Environment* [1997] 35 P & CR 259 affords a clear example of the doctrine of proportionality being used as a tool to test the validity of planning permission. In that case, it was held by the court that it was unreasonable for the Secretary of State to insist on the implementation of a policy that would be 'unreasonably burdensome' to the applicant. So, in *MPPP*'s case, the Federal Court added:

> So here we see proportionality being used as a tool to test the validity of a refusal of planning permission. In particular, in determining whether the discretionary power to grant or refuse planning permission had been exercised improperly or mistakenly the Court carried out a balancing exercise and concluded that because the company would have had to shoulder a disproportionate burden *albeit* in the implementation of a legitimate planning goal, the exercise of the power was rendered *ultra vires*.

The Federal Court concluded:

> In our view, upon the background facts, as found by the Court of Appeal, with which we concur, and the applicable law, the severity of the requirements of the disputed condition would be out of all proportion to the extension of planning permission sought.

Based on the above authorities, this court is of the view that the doctrine of proportionality as raised by the applicant may be applicable in the present application. That doctrine can only be heard, considered and determined during full hearing of the substantive application for *certiorari*.

The issue of legitimate expectation was also raised by the applicant in the present application. In raising the issue, the applicant highlighted the fact that the granting of the said planning permission by the 1st respondent, appears to be a reversal of policy by the 1st respondent of only approving low-rise developments or developments with buildings below five storey high in the Bukit Damansara. The applicant is contending that this amounts to a breach of his legitimate expectation.

The Federal Court in *MPPP*'s case had chosen to depart from the English law which so far has confined legitimate expectation to merely having an impact on the procedure and not the merits or substance of the decision. In *MPPP*'s case the Federal Court preferred the view of Simon Brown LJ in *Ex parte Baker* [1995] 1 All ER 73, at pp. 88 and 89; and Sedley J in *Ex parte Hamble* [1995] 2 All ER 714 at pp. 723-724, as showing that the concept of legitimate expectations has not only an impact on procedure but also a substantive impact. In light of the decision in the *MPPP*'s case, there are two forms of legitimate expectation, namely, the applicant is capable of having a legitimate expectation of a right to be heard before a decision is made (procedural legitimate expectation); and the applicant is also capable of having a legitimate expectation that the 1st respondent when making his decision, will not renege on his previous assurance or reverse his previous policy (substantive legitimate expectation). All these issues and novel points of law need to be considered and determined at the hearing of the substantial motion for *certiorari*.

In the event this court grants leave to apply for *certiorari*, the applicant also prays for a stay order as per para. 2 of the application.

Such stay order is permissible made O. 53 r. 3(5) RHC 1980, which provides:

> The grant of leave under this rule, shall not, unless the Judge so directs, operates as a stay of the proceedings in question.

The phrase 'a stay of the proceedings' must have a wider application. It does not confine to proceedings in a court only. Today, many applications for judicial review are for orders of *certiorari* to quash decisions of decision-making bodies other than courts, including government ministers, local authorities and other bodies whose decisions are susceptible to judicial review. Thus the phrase 'a stay of the proceedings' in relation to such bodies must mean 'a stay of the process by which the decision challenged has been reached, including the decision itself.' (see: *R v. Secretary of State for Education and Science, ex parte Avon County Council* [1991] 1 All ER 282). Judicial review, by way of an application for *certiorari*, is a challenge to the way in which the decision has been arrived at.

The decision-maker may appear to argue that his or its decision was reached by an appropriate procedure. Thus, as had been decided in *Ex parte Avon County Council*, a decision made by an officer or minister of the crown as well as other relevant decision-making bodies can, in principle, be stayed by an order of the court. That the court should have the power to order a stay of a decision of a decision-making body pending the conclusion of a challenge to the decision-making process by way of judicial review. In the present application, if the court does not direct a stay of proceedings as prayed by the applicant (as in para. 2 of encl. 1), it means that the 2nd respondent can proceed to develop the said land as approved by the 1st respondent. This would mean that the applicant's substantive motion for *certiorari* would be rendered nugatory in the event he succeeded in his application.

Conclusion

At this stage of the proceedings, the court is satisfied that the matter to be decided is not frivolous or vexatious; and that the applicant has produced sufficient evidence or some substance in his grounds supporting the application. Therefore the court grants the applicant's application for leave as well as for stay of proceedings as prayed in encl. 1.